Fenwick Employment Brief

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PER SE RULES REGARDING "ME TOO" EVIDENCE REJECTED

In *Sprint/United Mgmt. Co. v. Mendelsohn*, the United State Supreme Court held that "me too" evidence of discrimination is neither *per se* admissible nor *per se* inadmissible in an age discrimination lawsuit, and trial courts are required to engage in a balancing test to determine whether such evidence should be admitted.

The plaintiff in *Sprint* sought to introduce testimony from five other employees who claimed that they also had been discriminated against on the basis of their age. However, none of the five employees worked in plaintiff's department, nor worked under plaintiff's supervisors, and none of them heard any discriminatory remarks from plaintiff's supervisors. The employer moved to exclude the evidence as irrelevant.

The Supreme Court held that the determination of whether such evidence of alleged discrimination by other supervisors is irrelevant and/or too prejudicial in any discrimination case requires a "fact-intensive, context-specific inquiry" by the trial court that is not subject to *per se* rules. Courts must assess "how closely related the evidence is to the plaintiff's circumstances and theory of the case."

While the Court failed to articulate a specific admissibility test, its decision allows employers to continue to argue that "me too" evidence should be excluded where the evidence is irrelevant and/or unfairly prejudicial.

TIME-BARRED ACTS CAN SHOW A PROHIBITED MOTIVATION FOR TIMELY ADVERSE ACTIONS

We previously summarized the United States Supreme Court's *Ledbetter v. Goodyear* decision, http://www.fenwick.com/publications/6.5.4.asp?mid=24, in which the Court held that a plaintiff could not assert a timely Title VII claim based upon acts of intentional discrimination that occurred outside the limitations period, and which adversely affected the plaintiff's pay within the limitations period. In a recent California appellate court decision, *Hammond v. County of Los Angeles*, the court held that *Ledbetter* does not prohibit an employee from using untimely evidence of discrimination to show an unlawful motivation for intentional adverse actions which occur within the limitations period.

Hammond, a nursing instructor, alleged that her supervisor discriminated against her on the basis of her age and race by taking away her teaching assignments over a period of more than two years. While Hammond alleged that her supervisor made discriminatory remarks based upon her age and race, all of the remarks occurred more than a year prior to the filing of her administrative claim. The employer moved to dismiss Hammond's claims because of untimeliness.

Applying California law, the court determined that alleged adverse actions which occurred during the limitations period could be attributed to evidence of intentional discrimination which occurred **outside** the limitations period. The court distinguished the *Ledbetter* decision on the ground that *Ledbetter* involved the **effects** of intentional discrimination (with no allegations of intentional discrimination) which occurred within the limitations period, whereas Hammond alleged that intentional acts of discrimination (*i.e.*, a reduction in assignments) occurred within the limitations period that were linked to prior discriminatory actions outside the limitations period.

The *Hammond* decision is troubling because it may allow plaintiffs to attempt to "revive" untimely acts of alleged discriminatory conduct, provided plaintiffs can establish a sufficient relationship between the untimely acts and a subsequent, timely alleged adverse action (*e.g.*, same supervisor involved in both the untimely discriminatory conduct and the timely adverse action).

IT WORKER DETERMINED TO BE AN EXEMPT ADMINISTRATIVE EMPLOYEE

In a favorable decision for employers, especially technology companies, a California appellate court in *Combs v. Skyriver Communications* held that a former Director of Network Operations for an internet service provider was properly classified as an exempt administrative employee under California law.

In reaching its conclusion, the court rejected the application of the "administrative/production worker" dichotomy test used in prior court decisions, finding that the bright line rule was not applicable because the employee performed "specialized functions" (not merely "routine and unimportant" tasks) that could not be easily categorized in terms of the dichotomy. The court noted that unlike a traditional organization, Skyriver was "much more of a flat organization," typical of some start-up companies where "everybody worked with everybody," and in this context, the use of the administrative/production worker dichotomy test was not appropriate.

Although the employee, whose core responsibility was maintaining the well-being of the employer's computer network, argued that he primarily performed non-exempt production work, the court determined that his duties fell within the administrative exemption.

This ruling provides support for an administratively exempt classification for certain California IT workers who perform specialized functions, and who do not otherwise qualify as exempt computer professionals or executives. However, employees are cautioned to conduct a task-specific intensive inquiry with each such IT position.

COMING SOON: SWEEPING CHANGES TO FMLA RULES

The Department of Labor has issued proposed revisions to the federal Family and Medical Leave Act ("FMLA") regulations. If adopted, these new regulations will be the first significant update to FMLA since its enactment fifteen years ago. The proposed changes include:

- Employers will be able to directly contact health care providers for authenticating and clarifying a medical certification.
- Employers can require that health care providers certify that an employee is able to perform a list of essential job functions.
- Employees can be required to follow their workplace call-in procedures when taking unscheduled, intermittent leave, unless extraordinary circumstances exist.
- Employers will have up to 5 business days (rather than 2) in which to notify employees of their eligibility to take FMLA leave after either the employee requests leave or the employer acquires knowledge that the leave may be for an FMLA-qualifying reason.
- Employees must make a "reasonable effort" to schedule intermittent leave so as to not unduly disrupt an employer's operation.
- Employees must give notice within the same day (if knowledge obtained during work hours) or the following day (if knowledge obtained after hours) when they become aware of a need for leave less than 30 days in advance. Employees can be required to provide more detailed information about their need for leave.
- Employers will have 5 business days (rather than 2) to request a medical certification. If the medical certification is incomplete or insufficient, employers must describe the deficiencies in writing and give employees 7 calendar days to cure the problems.

- Employers may be liable for any individualized harm suffered by an employee due to a failure to comply with the notice obligations.

- Employers and employees can voluntarily agree to settle past FMLA claims without DOL or court approval.

In light of these proposed changes and the enactment of the new military leave obligations http://www.fenwick.com/publications/6.5.4.asp?mid=31, employers should review their leave of absence policies and forms to ensure compliance.

NEWS BITES

Filing Of EEOC Intake Questionnaire Can Constitute "Charge"

In *Federal Express Corp. v. Holowecki*, the United States Supreme Court determined that any document which can reasonably be construed as a request for action and appropriate relief on the employee's behalf – including a completed EEOC intake questionnaire form accompanied by a 6-page affidavit – can constitute a "charge" under the Age Discrimination in Employment Act ("ADEA"), even though the EEOC did not notify the employer or conduct an investigation or conciliation. The Court held that a statement in the affidavit which asked the EEOC to "[p]lease force Federal Express to end their age discrimination plan" satisfied the requirement of a request for action, and the filing of the intake questionnaire established that the plaintiff had exhausted her administrative remedies (a prerequisite to filing suit in court).

Wrongful Termination Action Based On Internal Complaints About Working Conditions Preempted By NLRA

After drafting an e-mail to his supervisor entitled "trouble brewing," and encouraging other employees to express to management their concerns about working conditions, Richard Luke was terminated by his employer for insubordination and disruptive behavior. Luke subsequently brought an action for wrongful termination in violation of public policy based on California Labor Code Section 232.5, which prohibits an employer from taking adverse action against an employee for disclosing information about the employer's working conditions. In *Luke v. Collotype Labels USA, Inc.*, a California appellate court held that Luke's claim was preempted by the National Labor Relations Act ("NLRA") because the activities at issue were "concerted activities" arguably protected by the NLRA, and did not involve alleged violations of health and safety laws (which the court determined is the only wrongful termination in violation of public policy claim that is not subject to NLRA preemption).

Employer's Claims Against Former Employee For Disparaging Public Comments Dismissed Pursuant To Anti-SLAPP Statute

In *Nygard, Inc. v. Uusi-Kertulla*, a former employee published disparaging comments about his former company and its president (*e.g.*, he had to "slave/drudge almost without a break the whole time;" the president "keeps an eye on his workers like a hawk;" etc.) in a magazine. Nygard brought defamation and breach of contract claims against the former employee based on the comments. The former employee sought to dismiss the action based upon California's Anti-SLAPP statute, which allows a defendant to seek dismissal of a lawsuit arising from a person's exercise of free speech in connection with a public issue. In affirming the dismissal of the lawsuit, a California appellate court construed the Anti-SLAPP statute broadly. The court determined that a magazine qualified as a "public forum" because it was accessible to the public, and the former employee's comments were of "public interest" because the company's president was of interest to the Finnish community.

Memorized Customer List Can Be A "Trade Secret"

In *Al Minor & Assocs. Inc. v. Martin*, the Ohio Supreme Court held that an employee who solicited his former employer's clients based upon a customer list that he memorized was found liable for violating Ohio's trade secrets act. The court determined that information does not lose its character as a trade secret under the state's Uniform Trade Secrets Act ("UTSA") if it has been memorized: "It is the information that is protected by the UTSA, regardless of the manner,

mode, or form in which it is stored – whether on paper, in a computer, in one's memory, or in any other medium." However, the court did note that "memories casually retained" from employment are not actionable if the information memorized is not otherwise a trade secret.

Employees Cannot Sue For Damages Based On Non-Compliant OWBPA Releases

To constitute an effective waiver of claims under the Age Discrimination in Employment Act ("ADEA"), a release must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which include providing employees with a 21 or 45-day period in which to consider the releases and a 7-day period in which to revoke the releases. A release that fails to comply with these requirements will not constitute a valid waiver of an age discrimination claim under the ADEA. In *Baker v. Washington Group International*, a group of laid-off workers, while not trying to invalidate their defective OWBPA releases or assert claims of age discrimination, asserted causes of action solely based upon the employer's failure to comply with the requirements of the OWBPA. A Pennsylvania federal court ruled that the employer's failure to comply with the release requirements set forth in the OWBPA did not create an independent cause of action for damages and dismissed the action.

Employer Reasonably Accommodated Terminated Employee's Religious Needs By Providing Several Options To Employee

An employer who terminated an employee for failing to work on a religious holiday was not liable for failing to accommodate the employee's religious beliefs, where the employer provided several options for the employee to avoid working on such holidays. In *EEOC v. Firestone Fibers & Textiles Co.*, the employer provided an employee with a number of methods to avoid working on his Sabbath and religious holidays, including floating holidays, annual leave, shift swaps, and up to 60 hours of unpaid leave per year. When these methods were not enough to allow the employee to avoid working on a religious holiday, the employee was terminated. The Fourth Circuit Court of Appeals held that the employer satisfied its obligation to provide reasonable accommodation through the various methods it provided the employee to allow him to avoid working on the religious holiday, and that it was not required to violate the terms of its seniority-based collective bargaining agreement or infringe upon the rights of other employees to further accommodate the employee.

Court Rejects Seller's Attempt to Limit Scope of "Sale of Business" Non-Compete

Non-competition agreements are prohibited in California except in connection with the sale of a business. In *Alliant Insurance Services, Inc. v. Gaddy*, a California court of appeal upheld a non-compete against the seller of a business which prohibited the seller from competing against the buyer in all 58 California counties, and from soliciting the seller's former clients and any clients of the buyer with which he had substantial contact during his post-sale employment with the buyer. The court dismissed the seller's attempt to characterize the restrictions as unlawful restraints of trade, because there was evidence that the buyer engaged in business in all 58 counties. Further, the non-solicitation restriction was enforceable as to the buyer's clients because the seller became an employee of the buyer and thereby developed contacts with and knowledge about those clients.
